

**STATE OF NEW HAMPSHIRE**  
**DEPARTMENT OF LABOR**  
**CONCORD, NEW HAMPSHIRE**



v

**EXETER SUBARU**

**DECISION OF THE HEARING OFFICER**

**Nature of Dispute:** RSA 275:43 I unpaid wages  
RSA 275:43 I unpaid commissions

**Employer:** Exeter Subaru, 37 Portsmouth Ave, Stratham, NH 03885

**Date of Hearing:** January 5, 2015

**Case No.** 48908

**BACKGROUND AND STATEMENT OF THE ISSUES**

A Wage Claim was filed with the Department of Labor on September 17, 2014. The notice was sent to the employer and there was an objection. The objection was sent to the claimant and there was a request for a hearing. The Notice of Hearing was sent to both parties on December 9, 2014.

The claimant worked for the employer for about four months. For the first three months she was a salaried employee. After this initial period of time she started in a draw against commission wage plan. The draw amounted to about \$120.00 per day. The claimant left the job voluntarily.

The claimant testified that she missed five days with a Doctor's note that she had to be out. In an agreement with the employer she was allowed to work one extra day a week until she made up the five days. She said these make up days were approved and accounted for on her time cards. When she left employment the claimant was told that any commission earned was to be withheld to offset the five days she took off.

The claimant requested that the employer provide the time cards that would show she worked to make up the time.

The employer testified that the claimant worked under a signed hiring agreement that stated there was no accrual of time until after six months of employment. The employer also provided a written policy that an employee could not switch days off to make up those days.

The claimant maintains that the employer, a Nick McCarthy, told her to work the extra days. The employer did not provide the requested time cards.

### **FINDINGS OF FACT**

RSA 275:43 I Every employer shall pay all wages due to employees within 8 days including Sunday after expiration of the week in which the work is performed, except when permitted to pay wages less frequently as authorized by the commissioner pursuant to paragraph II, on regular paydays designated in advance by the employer and at no cost to the employee:

- (a) In lawful money of the United States;
- (b) By electronic fund transfer;
- (c) By direct deposit with written authorization of the employee to banks of the employee's choice;
- (d) By a payroll card provided that the employer shall provide to the employee at least one free means to withdraw up to and including the full amount of the employee balance in the employee's payroll card or payroll card account during each pay period at a financial institution or other location convenient to the place of employment. None of the employer's costs associated with a payroll card or payroll card account shall be passed on to the employee; or
- (e) With checks on a financial institution convenient to the place of employment where suitable arrangements are made for the cashing of such checks by employees for the full amount of the wages due; provided, however, that if an employer elects to pay employees as specified in subparagraphs (b), (c), or (d), the employer shall offer employees the option of being paid as specified in subparagraph (e), and further provided that all wages in the nature of health and welfare fund or pension fund contributions required pursuant to a health and welfare fund trust agreement, pension fund trust agreement, collective bargaining agreement, or other agreement adopted for the benefit of employees and agreed to by the employer shall be paid by every such employer within 30 days of the date of demand for such payment, the payment to be made to the administrator or other designated official of the applicable health and welfare or pension trust fund.

This is the section of the law that mandates an employer to pay an employee all wages due at the time the wages are due and owing. Any commissions are considered wages when due.

It is the finding of the Hearing Officer, based on the written submissions and the testimony presented for the hearing, that the Wage Claim is valid. The claimant has the burden to show that there are wages due and owing and she met this burden.

The claimant was credible in her testimony that there were wages due because even though she took off time, during her employment, the company asked her to make the time up. She testified that she did this and recorded the extra time on her time cards. These cards, although requested, were never produced by the employer.

The employer maintains that it is the policy not to allow days to be substituted because that would leave the potential of too many employees one day and not enough on another. There is also a policy of not accruing time for the first six months. However the employer does not provide the time card that would show time worked.

The Hearing Officer finds that the claimant was allowed to make up five days by working five extra days. This practice is not using accrued time. This is time worked.

The Wage Claim is valid in the amount of \$600.00.

**DECISION AND ORDER**

Based on the testimony and evidence presented, as RSA 275:43 I requires that an employer pay all wages due an employee, and as this Hearing Officer finds that the claimant proved by a preponderance of the evidence that she was not paid all wages due, it is hereby ruled that the Wage Claim is valid in the amount of \$600.00.

██████████ in the total of \$600.00, less any applicable taxes, within 20 days of the date of this Order.

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Thomas F. Hardiman  
Hearing Officer

Date of Decision: January 23, 2015

TFH/kdc